88-211

No. _____

Supreme Court, U.S.
FILED
JUN 10 1988
JOSEPH F. SPANIOL, JR.
CLERK

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1987

PHILIP D. LEHMAN,
Petitioner

vs.

COMMONWEALTH OF PENNSYLVANIA,
Respondent

ON WRIT OF CERTIORARI TO THE
SUPERIOR COURT OF PENNSYLVANIA

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

A. Whether Petitioner's Sixth Amendment right to counsel under the United States Constitution was violated when his trial counsel rendered him constitutionally ineffective assistance of counsel by not adequately consulting with Petitioner over the decision not to testify at trial?

B. Whether Petitioner's Sixth Amendment right to counsel under the United States Constitution was violated when his trial counsel rendered him constitutionally ineffective assistance of counsel by failing to call character witnesses, who were present in the courtroom, at trial?

LIST OF ALL PARTIES

The parties to this proceeding are: Philip D. Lehman, Petitioner herein, by and through his attorney, William C. Costopoulos, Esquire; and the Commonwealth of Pennsylvania, Respondent herein, by and through Mark Bellavia, Esquire, Assistant District Attorney of York County, Pennsylvania.

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REFERENCE TO OPINIONS BELOW

The Memorandum Opinion of the Superior Court of Pennsylvania dated October 15, 1987, affirming Petitioner's judgment of sentence is reproduced in the Appendix at page A1. The Opinion of the Honorable Emanuel A. Cassimatis, Judge of the Court of Common Pleas of York County, Pennsylvania, dated October 22, 1986, denying Petitioner's first post-trial motions is reproduced in the Appendix at page A7. The Opinion of Judge Cassimatis dated February 19, 1987, denying Petitioner's second post-trial motions is reproduced in the Appendix at page A15.

STATEMENT OF JURISDICTION

This Petition is brought pursuant to 28 U.S.C.A. 1254(1) and Rule 17 of the Rules of this Court. This Petition is from the denial of the Petition for Allowance of Appeal by the Supreme Court of Pennsylvania entered on April 12, 1988, in the case of Commonwealth of Pennsylvania vs. Philip D. Lehman, docketed at No. 245 M.D. Allocatur Docket 1987.

CONSTITUTIONAL PROVISIONS AND STATUTES

Sixth Amendment to the United States Constitution

"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public

trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence."

Criminal attempt. 18 Pa.C.S.A. 901(a)

"(a) Definition of attempt.-- A person commits an attempt when, with intent to commit a specific crime, he does any act which constitutes a substantial step toward the commission of that crime."

Voluntary Manslaughter. 18 Pa.C.S.A. 2503(a)

"(a) General Rule.-- A person who kills an individual without lawful justification commits voluntary manslaughter if at the time of the killing he is acting under a sudden and intense passion resulting from serious provocation by:

(1) the individual killed; or

(2) another whom the actor endeavors to kill, but he negligently or accidentally causes the death of the individual killed."

STATEMENT OF THE CASE

On March 6, 1985, Petitioner, his former girlfriend and her date were all at the Spring Grove VFW hall during the evening. At some point Petitioner was asked by the management to leave the premises. Later that night Petitioner, who was armed, confronted the former girlfriend and date as they departed from the VFW. A struggle then ensued between Petitioner, one William Neail, a bystander, and the date during the course of which a .22 pistol discharged. With the arrival of a police officer Petitioner, who was intoxicated, was subdued and immediately placed under arrest.

Petitioner was represented by Scott L. Kelley, Esquire, at a jury trial presided over by the Honorable Emanuel A. Cassimatis of the York County Court of Common Pleas. Charged

with criminal attempt to commit criminal homicide and related offenses, Petitioner was convicted of criminal attempt to commit voluntary manslaughter and possession of prohibited offensive weapons on September 20, 1985. He timely filed post-trial motions on September 30, 1985, which motions were denied on October 22, 1986. Petitioner then retained William C. Costopoulos, Esquire, as appellate counsel, who filed a motion for a new trial on the basis of ineffective assistance of counsel on or about December 5, 1986. Following an evidentiary hearing on December 29, 1986, and the submission of briefs, Judge Cassimatis denied the motion on February 19, 1987. Petitioner was sentenced on March 2, 1987, to 2 to 4 years and fined $5,000. He timely filed a Notice of Appeal on March 31, 1987 with the Superior Court of Pennsylvania, which court denied his appeal in an Order and Opinion dated October 15, 1987. The Supreme

Court of Pennsylvania denied his Petition for Allowance of Appeal on April 12, 1988. Petitioner now files this Petition for Writ of Certiorari with Your Honorable Court.

STAGE IN PROCEEDINGS IN WHICH FEDERAL QUESTIONS RAISED

Petitioner's Sixth Amendment ineffective assistance of counsel claim was first raised by way of a post-trial motion with the trial court. Following an evidentiary hearing and the filing of briefs, Judge Cassimatis denied said motion. See Judge Cassimatis' second Opinion dated February 19, 1987, at p. A15. Petitioner then briefed the issue before the Superior Court of Pennsylvania, which also denied it. See the Memorandum Opinion of the Superior Court of Pennsylvania at p. A1.

REASONS FOR ALLOWANCE OF WRIT

A. Petitioner's Sixth Amendment right to counsel under the United States Constitution was violated when his trial counsel rendered him constitutionally ineffective assistance of counsel by not adequately consulting with Petitioner over the decision not to testify at trial.

Petitioner's entire defense to the crimes charged was premised on the gun accidentally discharging during the course of struggle with one William Neail, a defense not inconsistent with the testimony presented at trial by the Commonwealth. The only reasonable way to present that defense, and particularly Petitioner's intent to not harm anyone, was through Petitioner's own testimony. As

Petitioner testified at the evidentiary hearing, although he wanted to testify on his own behalf, his trial counsel informed him that he was not ready to testify.

A two-step analysis is implemented in order to determine a claim of ineffective assistance of counsel. The Pennsylvania Supreme Court has recently explicitly adopted Your Honorable Court's standard of review for ineffectiveness claims enunciated in Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). "Eschewing 'mechanical rules' for a 'totality of circumstances test,' Strickland requires that:

> Convicted defendant's claim that counsel's assistance was so defective as to require reversal of a conviction . . . has two components. First, the defendant must show that counsel's performance was deficient. This requires

> showing that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.

Strickland, 466 U.S. at 687, 104 S.Ct. at 2064, 80 L.Ed.2d at 693" as cited in Commonwealth v. Pierce, ___ Pa. ___, ___, 527 A.2d 973, 975 (1987).

A defendant's decision whether or not to testify at trial ultimately must be made by him after full consultation with counsel. Commonwealth v. Thomas, 279 Pa.Super. 413, 421

A.2d 267 (1980). Consultation presumably entails the pros and cons of the accused testifying on his own behalf; the posture of the case in the midst of trial; what might be elicited on cross-examination and just how damaging that information might be; whether a defendant's prior criminal record would be admissible to impeach his credibility; and whether the defendant would make a good appearance as a witness, that is, would he be credible, would he engender sympathy from the jury.

Here, Petitioner testified at the evidentiary hearing that he did want to testify at trial, but that trial counsel told him not to because Petitioner was not ready. (R. 26a). According to Petitioner, trial counsel "didn't prepare me before. I was in his office very little at any time and I feel that, you know, I wasn't ready." (R. 28a). Keeping in mind that the defense was that

Petitioner's gun accidentally discharged in the scuffle with Mr. Neail, a defense consistent with the evidence adduced by the Commonwealth, it was imperative that Petitioner personally testify that it was not his intention to shoot anyone as well as to corroborate the evidence that the gun had accidentally discharged. Petitioner testified at the hearing that "I was there not to shoot anyone, just to scare them. I wanted to talk to them but not harm anyone." (R. 26a).

Trial counsel, Mr. Kelley, denied that he told Petitioner he was not prepared to testify and therefore should not. (R. 32a). Rather, trial counsel stated that the most significant reason for recommending to Petitioner that he not take the stand was Petitioner's alleged representation that he had very little recollection of the incident in question. (R. 32a). This advice, however, overlooked the basic evidentiary fact that the evidence

presented at trial by the Commonwealth was in accord with the defense stance: the gun had accidentally discharged. Petitioner's testimony to the effect that he didn't remember all the details could not have disproved that which the prosecution itself had already proved and could not, therefore, have undermined the defense. What was critical to establish for Petitioner was his intent at the time, that he did not intend to harm anyone. That could only be shown by the Petitioner himself, testifying on his own behalf.

Indeed, trial counsel stated that he found Petitioner "to be a likeable, credible witness and someone that was in a circumstance that shouldn't have occurred. I had a lot of sympathy for him." (R. 30a-31a). If that was trial counsel's professional opinion of Petitioner's demeanor as a prospective witness, doesn't it follow that the jury might

have found Petitioner "likeable", "credible" and even have had "sympathy" for him?

Moreover, the record supports Petitioner's contention that he was not adequately prepared by defense counsel to testify. Trial counsel testified that the opening day of trial he arrived at a plea agreement with the prosecutor, which Petitioner accepted. The prosecution later informed trial counsel that the plea was not acceptable to the victims or the police, which left Mr. Kelley "angry." It was at this stage of the proceedings that Mr. Kelley sought a continuance from the trial judge, who refused to grant one. (R. 30a).

Notwithstanding the colloquy conducted by the trial judge with Petitioner (see R. 24a-25a), the claim of ineffectiveness here centers on whether the decision to not testify was adequate and whether his advice to Petitioner that he not testify was well-

founded. Petitioner's contention, given that his and trial counsel's versions of that decision differ markedly, is at least of arguable merit. Commonwealth v. Courts, 315 Pa.Super. 108, 461 A.2d 820 (1983). A last-minute plea agreement collapsed the day of trial. The trial judge refused defense counsel's request for a continuance. Petitioner testified that counsel spent very little time with him in pre-trial preparation. Taken together, these factors are of significant enough import to move on to consideration of the merits of the ineffectiveness claim.

Was trial counsel's consultation with Petitioner adequate and did his advice then to Petitioner to not testify have any reasonable basis designed to effectuate Petitioner's interests? The inadequacy of the consultation is supported by several factors. First, that a trial was held at all when it was held

appeared to be somewhat of an unwelcome surprise to trial counsel. Second, trial counsel did not sufficiently explore the options open to Petitioner before the decision to not testify, which was possibly related to the tight time factor. Apart from informing Petitioner he would be subject to cross-examination which, because of his inability to recall the details of the incident might have been damaging in defense counsel's estimation, it seems that no discussion of the other alternatives was held. That is, bringing to the jury's attention Petitioner's intent as well as corroborating the fact that the gun had accidentally discharged could only be accomplished by way of Petitioner's own testimony. The clear advantages of Petitioner testifying, of course, must be weighed with the potentially negative results of his exposure under cross-examination. But this weighing exercise, from the record, was not

fully conducted by trial counsel with Petitioner.

And finally Petitioner emphatically testified at the evidentiary hearing that counsel told him, "I feel that you are not ready for the stand, I'm not going to put you up." (R. 28a). Based on these elements, the inadequacy of Mr. Kelley's consultation with Petitioner rendered his "decision" to not testify an uninformed, defective waiver of his constitutional right to testify on his own behalf, irrespective of the trial colloquy. In fact, when Petitioner was asked by the trial judge whether the trial judge asked him if it was his decision to testify or not, Petitioner replied: "I know it wasn't my decision, sir." (R. 28a-29a). Hence, Petitioner has clearly met the first prong of the Strickland test: his trial counsel's performance was deficient.

Because of the importance in this case of establishing Petitioner's intent to not harm anyone, and assuming that the Commonwealth in its own case had already circumstantially proved that the gun had accidentally discharged, trial counsel's inadequate advice to Petitioner over the decision not to testify obviously prejudiced him inasmuch as it precluded Petitioner from fully presenting his sole defense. Only Petitioner himself could have shown, by personally taking the witness stand, that he did not intend to harm anyone. And even cross-examination could not have detracted from, but only corroborated the evidence that the gun had accidentally gone off during the struggle with Mr. Neail. Trial counsel was ineffective, then, for not adequately consulting with Petitioner and, that Petitioner, based on his inadequate representation, did not testify on his own behalf at trial, prejudiced him because he

could not personally explain to the jury how the gun accidentally discharged.

Accordingly, because Petitioner was denied constitutionally effective assistance of counsel in violation of the Sixth Amendment as interpreted in Strickland v. Washington, supra and Commonwealth v. Pierce, supra, Petitioner respectfully requests that Your Honorable Court grant certiorari and review the merits of this case.

B. Petitioner's Sixth Amendment right to counsel under the United States Constitution was violated when his trial counsel rendered him constitutionally ineffective assistance of counsel by failing to call character witnesses, who were present in the courtroom, at trial.

Character witness testimony is always admissible for the defendant in a criminal case. Commonwealth v. Simler, 320 Pa.Super. 342, 467 A.2d 355 (1983). "[E]vidence of good character is substantive and positive evidence, not a mere make-weight to be considered in a doubtful case, and, . . . is an independent factor which may of itself engender reasonable doubt or produce a conclusion of innocence." Commonwealth v. Gaines, 167 Pa.Super. 485, 492, 75 A.2d 617,

620 (1950) (citations omitted). "[I]n a case . . . where intent and credibility are decisive factors leading to either acquittal or conviction, the accused's reputation is of paramount importance. Indeed, evidence of good character may, in spite of all evidence to the contrary, raise a reasonable doubt in the minds of the jury." Commonwealth v. Shapiro, 223 Pa.Super. 15, 297 A.2d 161, 163 (1972). Your Honorable Court has also affirmed a defendant's right to present character witnesses on his behalf and the potentially dispositive nature of that character witness evidence. See, inter alia, Michelson v. United States, 335 U.S. 469, 69 S.Ct. 213, 93 L.Ed.2d 168 (1949). And finally, evidence of good character must be related to the defendant's general reputation in the community, at or about the same time of the incident, for the particular traits of character involved in the commission of the

crime charged. Commonwealth v. Thomas, 282 Pa. 20, 127 A. 427 (1925).

Petitioner testified at the evidentiary hearing that he had character witnesses available to him at the time of trial, four of whom were actually present in the courtroom during the trial. He further stated that he could have had additional character witnesses present if he had asked them to come. (R. 27a). Because Petitioner stood accused of crimes of violence, admissible character traits would have concerned Petitioner's traits of non-violence or peacefulness, quietness, honesty, truthfulness and of being a law-abiding citizen. Clearly evidence of these good character traits bore a direct relationship to Petitioner's credibility, assuming he had testified on his own behalf, and to his defense: that it was not his intention to harm anyone and that the gun had accidentally discharged. In other words,

these character witnesses would have demonstrated that Petitioner was not the kind of person who would commit these crimes.

Because character evidence was admissible and would have been advantageous to Petitioner in this case, the claim of ineffectiveness is of arguable merit. To be considered next is whether there was any reasonable basis for the failure of trial counsel to call any of Petitioner's character witnesses.

When asked why he chose not to call any character witnesses, Mr. Kelley responded that:

> it coincided with the way the entire case was presented in that there did not seem to be adequate testimony on the part of the Commonwealth to show anything other than Reckless Endangerment, that there was an error made, there was carelessness here, that there was no intent.

> The character witnesses could not give us any particular assistance. And, in fact, my recollection, and I am going back a year and a half, was that they could be questioned as to an incident that had occurred a number of years ago in Mr. Lehman's life, which I didn't think would be particularly helpful. (R. 33a-34a).

The naked assertion that character evidence would not be helpful hardly meets the standard for choosing to not call character witnesses.

In Commonwealth v. Luther, 317 Pa.Super. 41, 463 A.2d 1073 (1983), the Superior Court stated that the appropriate standard for determining whether to present character evidence was whether trial counsel had conducted "a careful selection between available alternatives -- e. g., consideration

of the relative value of presenting character testimony through ascertained potential witnesses as opposed to the absence of such testimony . . ." Id., 463 A.2d at 1079. In Luther the defendant, who was convicted of rape, asserted that trial counsel was ineffective for failing to call character witnesses. The Superior Court agreed and reversed, noting that despite the importance of such testimony, trial counsel had "failed to identify, interview, select and prepare any potential character witnesses." Id.

From the record in the case at bar, trial counsel did not appear to carefully weigh any alternatives but rather decided to not call any character witnesses in conjunction with his overall trial strategy of presenting no defense case. Unlike Luther, where the prospective witnesses were not physically present, Petitioner here had four character witnesses actually in attendance at trial.

Yet inexplicably Mr. Kelley, it appears, did not even bother to interview let alone call them.

Mr. Kelley did note that he was concerned that an apparent 1973 simple assault conviction of Petitioner might have been used on cross-examination of the character witnesses. This potential drawback, however, was speculative at best. First, he failed to obtain a ruling from the trial judge as to its admissibility. (R. 34a). Given its remoteness in time -- twelve years earlier-- that prior criminal conviction most likely would not have entered in. And second, even if it had been admitted, it is quite possible that at least some of the proposed character witnesses would have known Petitioner's reputation in the community subsequent to 1973, in which event cross-examination of them on the simple assault conviction would have been irrelevant and therefore impermissible.

Trial counsel did not properly explore this issue as part of his general failure to weigh the possible alternatives.

Finally, character evidence testimony here was necessary to bolster the credibility of Petitioner, particularly had he testified, and to show that Petitioner was a peaceful person, one not apt to intentionally fire a gun with the aim of harming anyone. In Commonwealth v. Simler, supra, the defendant was awarded a new trial from his simple assault conviction based on his trial attorney's failure to call character witnesses. The Superior Court pointed out that where credibility was a substantial issue -- three prosecution witnesses versus the defendant -- as well as defendant's reputation for non-violence -- simple assault as a crime of violence, character evidence was vital. Similarly with Petitioner, the Commonwealth's case rested on the testimony of three

witnesses and the crimes charged were of a violent nature. Credibility and peacefulness, among other character traits, were important elements to be substantiated with character evidence.

Because trial counsel had no reasonable basis for failing to call Petitioner's character witnesses (whom he apparently neglected to even interview despite their presence in the courtroom), the first aspect of the Strickland v. Washington, supra test for ineffective assistance of counsel claims has been satisfied -- his attorney's performance was defective. And since this case was one in which character evidence alone may very well have been enough to raise a reasonable doubt as to his guilt, Petitioner was certainly prejudiced by trial counsel's deficient performance in contravention of his Sixth Amendment right to counsel-- Strickland's second prong. Accordingly,

Petitioner respectfully requests that Your Honorable Court grant this Petition and review the merits of his case.

WHEREFORE, Petitioner, Philip D. Lehman, based on the foregoing, respectfully requests that Your Honorable Court grant his Petition for Writ of Certiorari and review the merits of the case.

RESPECTFULLY SUBMITTED:

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APPENDIX

MEMORANDUM OPINION OF THE SUPERIOR COURT OF PENNSYLVANIA

IN THE SUPERIOR COURT OF PENNSYLVANIA
HARRISBURG DISTRICT

COMMONWEALTH OF PENNSYLVANIA

vs. No. 185 HBG 1987

PHILIP D. LEHMAN,
Appellant

Appeal from the Judgment of Sentence of the Court of Common Pleas, Criminal Division, of York County, No. 794 of 1985.

Before: CAVANAUGH, BECK, and MONTGOMERY, JJ.

MEMORANDUM FILED: OCTOBER 15, 1987

Appellant Philip D. Lehman was convicted of criminal attempt (voluntary manslaughter) and possession of prohibited offensive weapons. Timely post-trial motions were denied. Appellant than retained new counsel, who filed a motion for a new trial on the basis of ineffective assistance of counsel.

Following an evidentiary hearing, this motion was denied. Appellant was sentenced to two to four years imprisonment and a $5,000.00 fine. This direct appeal followed. Finding no merit to appellant's argument, we affirm. Both of appellant's arguments are couched in terms of trial counsel's ineffectiveness. In reviewing such a claim, we must first determine whether the issue underlying the charge of ineffectiveness is of arguable merit, and, if so, whether the course chosen by counsel has some reasonable basis designed to serve the interests of his client. Commonwealth v. Buehl, 510 Pa. 363, 508 A.2d 1167 (1986); Commonwealth ex rel. Washington v. Maroney, 427 Pa. 599, 235 A.2d 349 (1967). Further, the petitioner must show that counsel's ineffectiveness prejudiced his case. Commonwealth v. Pierce, 345 Pa.Super. 324, 498 A.2d 423 (1985). Under these standards,

appellant's claims are without merit and relief was properly denied.

Appellant first contends that trial counsel was ineffective for not adequately consulting with appellant over the decision that appellant not testify at trial. At the evidentiary hearing, appellant testified that he wanted to testify but that counsel told him not to because he was not ready. The hearing judge specifically found appellant's testimony to be lacking in credibility. See, Commonwealth v. Abbruzzese, 293 Pa.Super. 246, 438 A.2d 977 (1981). Trial counsel, on the other hand, testified that he fully discussed this decision with appellant and that his recommendation was based on appellant's inability to recall the events in question. Further, the trial court questioned appellant, during trial, to determine that appellant understood that he had a right to testify and that the decision not to testify was his own

decision. Appellant has not, therefore, carried his burden of showing that there is arguable merit to this issue. Appellant next claims that counsel was ineffective for failing to call any character witnesses. Forseveral reasons, we reject this claim also. First, in order to prevail on this claim, appellant must show both that the witnesses were available and willing to testify, Commonwealth v. Burrell, 286 Pa.Super. 502, 429 A.2d 434 (1981), and that their testimony would have been helpful to his defense. Commonwealth v. Wallace, 347 Pa.Super. 248, 500 A.2d 816 (1985). Although appellant did testify to the names of certain witnesses, he did not show that these witnesses would be willing to testify nor did he present any evidence as to what testimony these witnesses would offer. Under the above test, therefore, this claim must fail.

Further, appellant cannot prevail on an ineffectiveness claim involving trial strategy unless he shows that the alternatives not chosen offered a potential for success substantially greater than the tactics actually utilized. Commonwealth v. Turner, 469 Pa. 319, 365 A.2d 847 (1977). Trial counsel testified that he was aware of the potential character witnesses. However, he felt that their testimony would add nothing to appellant's defense, which was that he lacked the requisite intent. Further, trial counsel was concerned that the character witnesses could be cross-examined regarding their knowledge of appellant's prior conviction of simple assault, which would undermine any positive effects of their testimony. Thus, we cannot conclude that presentation of the character witnesses offered a potential for success substantially greater than the decision not to do so.

Judgment of sentence affirmed.

OPINION OF THE HONORABLE EMANUEL A. CASSIMATIS
OF THE YORK COUNTY COURT OF COMMON PLEAS
DATED OCTOBER 22, 1986

IN THE COURT OF COMMON PLEAS
OF YORK COUNTY, PENNSYLVANIA

COMMONWEALTH OF PENNSYLVANIA

vs.

PHILIP D. LEHMAN

794 Criminal Action 1985

APPEARANCES: RICHARD W. SPONSELLER, ESQ.
Assistant District Attorney
For the Commonwealth

SCOTT L. KELLEY, ESQ.
For the Defendant

O P I N I O N

This matter is before the Court on a motion in arrest of judgment and in the alternative a motion for new trial following Defendant's conviction by a jury of attempted voluntary manslaughter. The Defendant has raised, briefed and argued the following.

1. Whether a jury may in a murder prosecution return a verdict of voluntary manslaughter even where there is no evidence of passion or provocation.

2. Whether intoxication is a defense to attempted voluntary manslaughter.

3. Whether certain remarks made by the District Attorney during his closing argument were reasonable inferences drawn from the evidence and used for a legitimate purpose.

We point out that Defendant has waived the issue of the Court's illustration of malice to the jury. Defendant failed to specify his contentions in a supportive brief as required by Local Rule 507(b)(5).

Viewing the evidence in the light most favorable to the verdict winner, the Commonwealth, we find the jury was justified in finding beyond a reasonable doubt the following facts. A few months prior to the incident leading to conviction, Defendant and

his girlfriend had separated after a period of years of living together. Defendant's numerous attempts at reconciliation failed. In the evening of March 6, 1985, Defendant's ex-girlfriend and her date were at the Spring Grove VFW. Defendant was also present but was asked to leave because of his loud and unruly conduct. At approximately 10:05 p.m., Defendant's ex-girlfriend and her date came out of the VFW to leave for the evening. In the parking lot, Defendant, who had been waiting in his truck, confronted them. Armed with a loaded sawed-off double-barreled shotgun, a loaded .357 Magnum revolver and a loaded .22 caliber Derringer, Defendant approached the truck the two were entering. At that moment, a witness and the ex-girlfriend's date wrestled Defendant to the ground. Defendant then fired with the Derringer, the bullet passing within inches of the restraining witness. Despite a police

officer's arrival, the Defendant continued his struggle to fire. Finally, the three persons were able to disarm Defendant. As the police officer got Defendant to his feet, Defendant was intoxicated and could not stand on his own. In the Defendant's pockets was found ammunition for the firearms, and a number of beer cans were found outside and inside the vehicle.

In this case, the jury convicted Defendant of attempted voluntary manslaughter. Defendant asserts that the jury must find sufficient cause of provocation and a state of rage or passion without time to cool which places the Defendant beyond the control of his reason and suddenly impels him to the deed. The Defendant is incorrect in this assertion. A jury may in a murder prosecution return a verdict of voluntary manslaughter even where there is no evidence of passion or provocation.

This same question was decided in Commonwealth v. Butcher, 451 Pa. 359, 304 A.2d 150 at 153 (1973) where the Supreme Court stated:

> Few propositions are better established in the criminal law than the doctrine that where the evidence would be sufficient to support a conviction of murder, the return of the verdict of voluntary manslaughter is strictly within the jury's prerogative even in the absence of provocation and passion.

The Court further explains that both the first degree murder and voluntary manslaughter require the finding of a specific intent to kill. Thus, where the facts would support a finding of first degree murder, a conviction of voluntary manslaughter is consistent with the evidence insofar as that it reflects an intentional unjustified killing. Id. at 153.

The evidence in the case before us is sufficient to support a verdict involving voluntary manslaughter. The facts indicate that Defendant, if he had been reasonable man, should have had time to cool down following his separation with his girlfriend. The facts also indicate that Defendant was lying in wait for his ex-girlfriend and her date to exit the VFW. We find sufficient evidence of a premeditated attempt to kill which would support a first degree murder conviction. Just as a jury may find voluntary manslaughter where the evidence supports a conviction of first degree murder, so may the jury find attempted voluntary manslaughter where the evidence supports a verdict of attempted first degree murder. Thus, we find that the jury was acting within its domain and upon the evidence produced at trial in determining Defendant guilty of attempted voluntary manslaughter.

The Defendant next complains that the Court erred in its refusal to instruct the jury concerning the defense of intoxication. We reaffirm that the law does not warrant such a charge. On April 7, 1976, the Crimes Code was amended to provide that voluntary intoxication is no defense to a criminal charge, and no evidence of such condition may be introduced to negate the element of intent of the offense except in cases of first degree murder. 18 Pa.C.S.A. 308. See, Commonwealth v. Ramsey, 309 Pa. Super. 137, 454 A.2d 1121, 1124 (1983). Therefore, the requested instructions were properly refused.

Finally the Defendant complains of certain remarks by the District Attorney in his closing statement to the jury. The District Attorney emphasized that had Defendant waited just a few moments, his opportunity to shoot the two would have increased. It is obvious from the record that

there was a reason for the remark which was directly related to the charge of attempt. Prosecution explains that the remark was designed to show just how substantial the step toward first degree murder was that Defendant took. Because there was a purpose for the remark which was a reasonable and logical inference from the evidence, we find it was in no way inflammatory or prejudicial to the Defendant.

Accordingly, we shall enter the following Order.

BY THE COURT,

Emanuel A. Cassimatis /s/

J.

Dated: October 22, 1986

OPINION OF THE HONORABLE EMANUEL A. CASSIMATIS
OF THE YORK COUNTY COURT OF COMMON PLEAS
DATED FEBRUARY 19, 1987

IN THE COURT OF COMMON PLEAS
OF YORK COUNTY, PENNSYLVANIA

COMMONWEALTH OF PENNSYLVANIA

vs.

PHILIP D. LEHMAN

794 Criminal Action 1985

O P I N I O N

The defendant, Philip D. Lehman, has filed a Petition for a Post-Verdict Hearing alleging that his trial counsel rendered him constitutionally ineffective assistance. A hearing was held on the petition and it will be dismissed.

The defendant was found guilty by a jury of attempted voluntary manslaughter. His

trial counsel, Scott L. Kelley, Esquire, filed post-verdict motions in arrest of judgment and for a new trial which were briefed and argued. On October 22, 1986, the court filed an opinion and entered an order dismissing the post-verdict motions and fixed sentencing for Tuesday, December 30, 1986. On December 4, 1985 [sic], William C. Costopoulos entered his appearance on behalf of the defendant, Philip D. Lehman, and filed the instant Petition for Post-Verdict Hearing. The following day the court entered an order fixing December 29, 1986, as the date of the hearing. Following the hearing on December 29, 1986, the court fixed a briefing schedule and directed that the sentence be continued generally.

The first issue which this court must decide is whether it has jurisdiction to adjudicate an ineffectiveness of counsel claim after trial counsel has filed post-verdict

motions which were disposed of by the court and the time for sentencing was fixed.

If defendant's supplemental petition denominated "Petition for Post-Verdict Hearing" is in fact an application under the Post Conviction Hearing Act (PCHA), clearly, it is not timely filed since the defendant has not yet been convicted.[1] Defendant argues, however, that his petition alleging ineffectiveness of counsel is in reality a post-verdict motion. Recognizing that trial counsel has filed post-verdict motions which have been disposed of by the court, defendant further argues he is entitled to file an additional post-verdict motion pursuant to Pa.R.Crim.P. 1123(a) which permits post-verdict motions to be filed beyond ten (10) days after a finding of guilty if the trial judge allows "upon cause shown."

The general rule is that issues not raised in post-verdict motions are not

preserved for appeal. "An exception to this exists, however, when ineffective assistance of prior counsel is raised. The rule then is that ineffectiveness of prior counsel must be raised at the earliest stage in the proceedings which counsel whose ineffectiveness is being challenged no longer represents the appellant." Commonwealth v. Seachrist, 478 Pa. 621, 624 (1978). Ineffectiveness of trial counsel may be raised on direct appeal and a failure to raise this issue on direct appeal creates a rebuttable presumption that the failure was "knowing and understanding" and the issue therefore is waived. Commonwealth v. Dancer, 460 Pa. 95, 99-100 (1975). In the Dancer case, the issue in a PCHA proceeding was whether the defendant had waived the issue of ineffectiveness of trial counsel by failing to raise the issue on direct appeal where he was represented by an attorney other than his trial counsel. The

Pennsylvania Supreme Court concluded that this issue was not waived stating the following:

> ". . . Our Post Conviction Hearing Act and the principles of judgment finality mandate that claims of ineffectiveness of counsel may only be raised in PCHA proceedings 1) where petition is represented on appeal by his trial counsel, for it is unrealistic to expect trial counsel on direct appeal to argue his own ineffectiveness, 2) where the petition is represented on appeal by new counsel, but the grounds upon which the claim of ineffectiveness assistance are based do not appear in the trial record, 3) where the petition is able to prove the existence of other 'extraordinary circumstances' justifying his

failure to raise the issue, Post Conviction Hearing Act [Section] 4(b)(2), 19 P.S. [Section] 1180-4(b)(2)(Supp.1974) or 4) where the petition rebuts the presumption of 'knowing and understanding failure,' Post Conviction Hearing Act [Section] 4(c), 19 P.S. [Section] 1180-4(c)(Suppl1974).[footnote 4]

On this record, the PCHA court's conclusion that appellant's claims were waived was proper except as to one claim of alleged counsel ineffectiveness. The sole unwaived claim is Dancer's allegation of counsel's failure to present at trial certain evidence he uncovered during his pretrial investigation. That issue did not and could not appear in the trial record. It was asserted for the first time in the

PCHA petition and its resolution required an evidentiary hearing. Therefore it was within the Post Conviction Hearing Act.

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4. Under these standards, it is clear that a petition may contest the ineffectiveness of direct-appeal counsel in a PCHA proceeding. See Commonwealth ex rel. Neal v. Myers, 424 Pa. 576, 227 A.2d 845 (1967)."

In the instant case defendant assigns as the ineffectiveness trial counsel's informing defendant that defendant was not ready to testify and trial counsel's declining to call or interview character witnesses available to testify in behalf of the defendant.

Thus, it appears that a trial court presented with a post-verdict motion by newly-

retained counsel alleging ineffectiveness of trial counsel would have two options: First, to refuse to grant a hearing on the basis that the motion is not timely filed, or, that the alleged grounds therefore do not appear of record, if such be the case; or, secondly, to schedule and conduct an evidentiary hearing on the motion. In the former, defendant will be deemed to have waived the issue, Commonwealth v. Seachrist, supra, and the matter will be dealt with on appeal with the probable result of a remand to the trial judge to conduct a hearing. In the latter, the court would conserve judicial resources and efficiently administer justice. We have opted for the second course, believing it the wiser as well as more practical.

A word about the late filing of the motion. We conclude that newly-retained counsel's having filed the post-verdict motion alleging ineffectiveness of trial counsel the

same day he entered his appearance and the risk of having been deemed to have waived the issue because not raised at the earliest stage, "cause" is established for the court to allow the late filing.

We now proceed to the substantive issue of whether defendant's trial counsel was constitutionally ineffective for not adequately consulting with defendant over the decision to not testify and for failing to call character witnesses.

When reviewing the effectiveness of counsel, the court must first determine whether the underlying claim has merit. If it does, the court then determines whether counsel's handling of the matter had some reasonable basis designed to effectuate his client's interests. Finally, the finding of ineffectiveness requires a showing that the course of action pursued by counsel was prejudicial to the defendant. Commonwealth v.

Blagman, _____ Pa.Super. _____, 504 A.2d 883 (1986).

Applying this three-prong test, we must first determine whether defendant's claim that he wanted to testify but did not testify because trial counsel told him not to because defendant was not ready does have merit. Defendant testified that he wanted to testify but his trial counsel told him not to because he was not ready and that his trial counsel did not prepare him to testify. On the other hand, trial counsel denied he told the defendant he was not prepared to testify. Rather, trial counsel stated that the most significant reason for recommending to defendant he should not take the stand was defendant's alleged representation that he had very little recollection of the incident in question. We note that at the trial out of the presence of the jury, the trial judge interrogated the defendant concerning the

indication from his attorney that the defendant was not going to testify. In this colloquy, the judge determined that the defendant understood that it was his right to testify and that it was his decision whether or not to testify. The defendant stated he understood this and that it was his decision not to testify. During the PCHA hearing, the defendant testified that he did not remember discussing with the trial judge on the record at the time of the trial whether it was his decision to testify or not. We find his credibility on this issue to be lacking, and therefore, conclude that this allegation is without merit.

Defendant's second allegation is that his trial counsel was ineffective for failing to call any character witnesses on his behalf at the trial. From the testimony it appears such character witnesses were available and that trial counsel's explanation for his not

calling character witnesses was that the character witnesses could not give any assistance in promoting the defense strategy of showing there was no intent on the part of the defendant in his conduct but, at most, it was that of carelessness. Trial counsel also recalled that the character witness might be questioned about an incident which occurred a number of years ago in the defendant's life which he did not think would be particularly helpful. Apparently this incident is in a 1973 simple assault conviction of the defendant which might have been used on cross-examination of the character witnesses. We conclude that the first prong of the above test in determining whether counsel is ineffective is met on this claim since the failure to fully advise the defendant prior to trial of the importance of character witnesses and failing to call character witnesses on behalf of a defendant at a trial has merit.

Commonwealth v. Luther, 317 Pa.Super. 41, 463 A.2d 1073 (1983).

In moving to the second prong as to whether there was no reasonable basis for counsel's action, we must examine the concern of counsel that the character witnesses might be cross-examined about the 1973 simple assault conviction of the defendant. We conclude this was a reasonable basis for the action of defendant's trial counsel.

In reaching this conclusion we are not unmindful of defendant's present arguments. First, before rejecting the use of character witnesses, his counsel should have obtained a ruling from the trial judge as to the admissibility of the prior criminal conviction given its having occurred twelve (12) years earlier. Hindsight may indicate this was an option. Moreover, this procedure may not be available.[2] Secondly, it is quite possible that at least some of the proposed character

witnesses would have known defendant's reputation in the community subsequent to 1973, in which case, their cross-examination on the simple assault conviction would have been irrelevant and impermissible. It is defendant's burden to prove that some of the character witnesses would have so testified. Such proof has not been presented. Thirdly, the character evidence was necessary to bolster defendant's credibility, had he testified, and to show defendant was a peaceable person, not apt to fire a gun intentionally to harm anyone. We have previously found defendant's credibility on the issue of wanting to testify to be lacking. As to showing the defendant a peaceable citizen, the disclosure of a prior conviction of simple assault would undermine this.

Accordingly, defendant's motion alleging his trial counsel rendered him

constitutionally ineffective assistance will be dismissed.

BY THE COURT,

Emanuel A. Cassimatis /s/

J.

Dated: February 19, 1987

1. See the treatment of this issue in Commonwealth v. Luther, 317 Pa. Super. 41, 463 A.2d 1073 (1983), especially the analysis of Judge Brosky in the concurring opinion.

2. Commonwealth v. Blatstein, 231 Pa. Super. 306, 318-319 (1974).

JUDGMENT ORDER OF THE
SUPREME COURT OF PENNSYLVANIA
MIDDLE DISTRICT

No. 245 M.D. Allocatur Docket 1987

COMMONWEALTH OF PENNSYLVANIA,
Respondent

vs.

PHILIP D. LEHMAN,
Petitioner

Appeal from the Order of the Superior Court of Pennsylvania entered on October 15, 1987, in the case docketed to No. 185 Harrisburg, 1987

Order denying the Petition for Allowance of Appeal dated April 12, 1988

Per Curiam.